APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED AUGUST 1, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: January 31, 2001 Decided: AUG -1 2001)

Docket No. 00-5055

IN RE CHRISTOS VOUZIANAS;
NOTA VOUZIANAS,

Debtors.

ROBERT L. PRYOR, Chapter 7 Trustee of the Bankruptcy Estate of Christos Vouzianas and Nota Vouzianas,

Appellant,

v.

READY & PONTISAKOS,

Appellee.

Before: STRAUB, POOLER and SACK, *Circuit Judges.*

Appeal from the July 24, 2000, judgment of the United States District Court for the Eastern District of New York

(Arthur D. Spatt, *J.*) affirming the December 3, 1999, order of Bankruptcy Judge Dorothy T. Eisenberg. We affirm because the bankruptcy court made no error when it restated, over the objection of bankruptcy trustee Robert L. Pryor, the firm of Ready & Pontisakos as counsel in a pre-petition personal injury lawsuit involving the debtor.

Affirmed.

Judge Sack dissents in a separate opinion.

* * *

POOLER, *Circuit Judge*:

Bankruptcy trustee Robert L. Pryor appeals from the July 24, 2000, judgment of the United States District Court for the Eastern District of New York (Arthur D. Spatt, *J.*) affirming the December 3, 1999, order of Bankruptcy Judge Dorothy T. Eisenberg. In this case we balance the trustee's claim of nearly unfettered discretion in choosing special counsel with the bankruptcy court's common sense consideration of the unique circumstances before it. Although the law does not always follow the path of common sense, in this case we find that practicality prevails.

BACKGROUND

In August 1994, Christos Vouzianas fell from a ladder at a work construction site and injured his arm and spine. He was not able to return to work after the accident, and in late 1994 he retained the law firm of Ready & Pontisakos

("Ready") on a contingency fee basis to represent him in a personal injury lawsuit. While the personal injury litigation was ongoing, Christos Vouzianas and his wife, Nota Vouzianas, filed a petition for relief under Chapter 7 of the bankruptcy code on April 2, 1999. Essentially the only asset of the bankruptcy estate is the debtors' potential recovery in the personal injury lawsuit. Pryor became permanent bankruptcy trustee representing the Vouzianas estate in May 1999.

In June 1999, Pryor applied to the bankruptcy court for approval to retain the law firm of Marcus & Katz to prosecute Vouzianas' personal injury lawsuit on a contingency fee basis. The trustee's motion acknowledged that Ready had been representing Christos Vouzianas in the litigation but nonetheless "elected" to substitute the Marcus law firm. The trustee in his motion papers stated that Marcus & Katz was capable of prosecuting the personal injury lawsuit, and the trustee did not raise any criticism of Ready's past performance as counsel. Pryor sought the court's permission for appointment of special counsel pursuant to 11 U.S.C. § 327(a), which states that the trustee "with the court's approval" may employ attorneys "that do not hold or represent an interest adverse to the estate, and that are disinterested persons" to assist the trustee in his duties. 11 U.S.C. § 327(a).[1]

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1. The statute states:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other

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On June 29, 1999, the bankruptcy court approved the trustee's application to retain the law firm of Marcus & Katz as special counsel to pursue the underlying personal injury lawsuit. In early September, the trustee and Marcus & Katz each requested that Ready turn over the Vouzianas legal file, but Ready refused to do so. On September 29, 1999, Ready filed a motion in bankruptcy court seeking, among other things, to reverse the court's appointment of Marcus & Katz and asking permission to stay on as the debtor's lawyer in the personal injury lawsuit. According to Ready, the trustee had not consulted with the firm before seeking to remove it as counsel. Christos Vouzianas filed an affidavit with the bankruptcy court stating that the trustee did not consult with him before changing his personal injury lawyers, and Vouzianas asked Judge Eisenberg to allow him to keep Ready as his lawyer. Pryor opposed Ready's motion and cross-moved pursuant to 11 U.S.C. § 542(e) for an order directing Ready to turn over documents related to the personal injury litigation. In their motion papers, Ready and Pryor disputed which party was responsible for delays in setting the trial date for the underlying personal injury lawsuit, and they argued strenuously about whether Ready was entitled to immediate reimbursement of approximately $5,000 in expenses it paid to advance the litigation.

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> professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

11 U.S.C. § 327(a).

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By an order dated December 3, 1999, the bankruptcy court granted Ready's motion and denied Pryor's cross-motion. Specifically, the order reversed the court's prior order appointing Marcus & Katz and retained "original counsel" Ready as special counsel to the trustee in the underlying personal injury lawsuit. Bankruptcy Judge Eisenberg had conducted a hearing on the issue and found that Pryor failed to make an appropriate inquiry to determine why a change in counsel was warranted. The bankruptcy court considered the circumstances of this case, where the debtor retained "capable counsel" that had been "actively involved for four or five years and has done a reasonable job," and it gave weight to "the confidence of [the] one witness, which is the injured party." In ruling in Ready's favor on the motion, Judge Eisenberg concluded that "certainly some discretion in a personal injury case has to be given to the debtor's choice and to the work and services that have been performed." Pryor appealed the bankruptcy court's decision to the district court.

Judge Spatt affirmed the bankruptcy court order in a written decision dated July 15, 2000. Judge Spatt first held that Section 327(a) did not apply to this case because the statute "does not authorize the Trustee to appoint counsel of his choice with regard to a Debtor's pre-bankruptcy personal injury cause of action." Judge Spatt then upheld Judge Eisenberg's decision that retaining Ready as counsel in the underlying litigation was in the best interests of the bankruptcy estate. The trustee again appealed the adverse decision. In response to our inquiry, counsel for both parties stated that the underlying personal injury lawsuit was scheduled to go to trial in Nassau County Supreme Court on January 29, 2001. During oral argument, however, counsel

informed us that the state court adjourned the trial until April 2, 2001, and thus obviated our immediate concern that this appeal may have been moot.

DISCUSSION

I. Standard of review

On this bankruptcy appeal, "we review the bankruptcy court decision independently," looking at issues of law *de novo* and accepting findings of fact unless they are clearly erroneous. *In re Arochem Corp.*, 176 F.3d 610, 620 (2d Cir. 1999).

II. Choice of special counsel

The question before us is whether the bankruptcy court improperly reversed its previous order appointing the trustee's choice of Marcus & Katz and approved Ready as special counsel for the underlying personal injury lawsuit. Pryor argues that the bankruptcy court ignored the attorney-client relationship that exists between a trustee and its special counsel and disregarded the trustee's fundamental right to select his own counsel. According to the trustee, the bankruptcy court misapplied the two-prong test of Section 327(a), and the district court erred when it held that Section 327(a) did not even apply to the facts of this case. Pryor contends that at a minimum the bankruptcy court should have allowed him to choose different special counsel rather than impose its choice upon the trustee. Ready responds that both courts correctly evaluated the best interests of the bankruptcy estate when they permitted Ready to remain in the underlying personal injury case.

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Section 327 in general regulates the trustee's ability to hire professionals and serves the important policy of ensuring that the professionals' service presents no conflict of interest. *See Arochem*, 176 F.3d at 621. Section 327(a) sets out a general two-part test that requires professionals working for the trustee and bankruptcy estate to (1) hold no interest adverse to the estate; and (2) be disinterested persons. *See* 11 U.S.C. § 327(a); *see also Arochem*, 176 F.3d at 621. "When evaluating proposed retention, a bankruptcy court 'should exercise its discretionary powers over the approval of professionals in a manner which takes into account the particular facts and circumstances surrounding each case and the proposed retention before making a decision.' " *Arochem*, 176 F.3d at 621 (quoting 3 Lawrence P. King, et al., *Collier on Bankruptcy*, ¶ 327.04[1][a] (15th ed. rev. 1998)). Relevant considerations are "the protection of the interests of the bankruptcy estate and its creditors, and the efficient, expeditious, and economical resolution of the bankruptcy proceeding." *Id.* (internal quotations omitted). *See also In re Vebeliunas*, 231 B.R. 181, 194-95 (Bankr. S.D.N.Y. 1999) (holding that Section 327(a) vests discretion in bankruptcy court to disapprove trustee's choice of special counsel not only for conflict of interest but also for other reasons serving the best interest of the estate).

Section 327(a) therefore requires the bankruptcy court's evaluation and approval of the trustee's choice of special counsel. However, in light of the "highly confidential" relationship between the special counsel-attorney and the trustee-client, courts normally will not interfere with that choice. *In re Mandell*, 69 F.2d 830, 831 (2d Cir. 1934). "[I]n general we regard it as inimical to good administration to

fasten an attorney on the trustee against his will," and "[o]nly in the rarest cases should the trustee be deprived of the privilege of selecting his own counsel." *Id.* Indeed, we normally accord such deference to the trustee's choice that courts will allow the trustee to nominate another attorney if the court finds the first nominee to be unsatisfactory. *Id.*; *see also Collier*, ¶ 327.04[1][a]. The general rule of deference to the trustee's choice of special counsel, however, has its exceptions. Sometimes reasons exist "which make it for the best interest of the estate to have the court select the attorney over the trustee's objection." *Mandell*, 69 F.2d at 831. In those circumstances, we require the bankruptcy court to articulate on the record its reasons for rejecting the trustee's choice. *Id.*

The record before us shows that Bankruptcy Judge Eisenberg did not lightly reject the trustee's choice of special counsel. She recognized the novel circumstances surrounding her decision, noting to Ready that "[i]t's an unusual case. I usually don't like to supplant [the trustee, and] for good cause . . . you would be out of here in five minutes." The bankruptcy court noted the lack of evidence that Ready was disqualified or incompetent for any reason and Pryor's failure to support his request for a change in counsel. Of particular importance to us is Judge Eisenberg's careful consideration of the interests of the estate in retaining Ready as counsel where the firm had invested time and money in the personal injury lawsuit and developed a sound working relationship with the plaintiff/debtor. Based on the record, the bankruptcy court's factual findings were not clearly erroneous.[2]

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2. Even though Judge Eisenberg accepted briefs and heard oral argument, Pryor argues that the bankruptcy court erred in failing to

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Pryor contends that the bankruptcy court erred because it failed to apply the two-part test of Section 327(a) to the retention of Ready as special counsel. According to the trustee, the bankruptcy court's scrutiny of the special counsel nominee is limited to determining adverse interests and disinterest. Clearly, the bankruptcy court is not so limited in its oversight of the trustee's actions. *See Mandell*, 69 F.2d at 831; *see also In re Harold & Williams Dev. Co.*, 977 F.2d 906, 910 (4th Cir. 1992) (holding that bankruptcy court should take into account the particular facts and circumstances of each case when approving trustee's selection of professionals). This case presents an unusual circumstance because the bankruptcy court reinstated as special counsel attorneys that had represented the debtor prior to his filing any petition for the limited purpose of continuing that pre-petition relationship. When Judge Eisenberg noted the lack of any grounds to disqualify Ready, she effectively applied the two-part test of Section 327(a). Moreover, Judge Eisenberg correctly evaluated the entire circumstances of the appointment and the impact that her decision would have on the bankruptcy estate. To that end, the bankruptcy court found that it was in the estate's best interest to allow the plaintiff/debtor to continue to use personal injury counsel with whom he was familiar.

The dissent agrees that allowing Ready to continue as the debtor's counsel may have been a "good idea" but

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give him an opportunity to supplement the record. However, the trustee was on full notice regarding the relevant issues before the court, which had no obligation to give Pryor another chance to make his arguments.

ultimately concludes that this case does not present an extraordinary circumstance in which the bankruptcy court may reject the trustee's choice of special counsel. We cannot take issue with the dissent's view of the facts. We do disagree, however, with the dissent's undue limitation of Second Circuit precedent in *Mandell.* The dissent concedes that *Mandell* remains good law for the proposition that "[o]nly in the rarest cases should the trustee be deprived of the privilege of selecting his own counsel" yet fails to see that a necessary outcome of that situation would be the court's appointment of special counsel. In other words, if the trustee is deprived of the privilege of choosing counsel, then someone else, namely the bankruptcy court, must assume the privilege. That is precisely what took place here, and the bankruptcy court did so only after supplying good reason as *Mandell* — and the commentary citing *Mandell* — requires. Of course, the bankruptcy court may also allow the trustee to make another choice of special counsel or conclude that no special counsel is required at all. Any of these three outcomes, however, is permitted under the current bankruptcy code. We must remember that Section 327 at its most basic level is a judicial check on the trustee's power, and that is precisely the role that the bankruptcy court here fulfilled.

The success of the underlying personal injury lawsuit is a particularly important consideration in this case because a potential recovery in this litigation is the estate's only asset. We realize that the importance of the recovery to the estate could have weighed in favor of allowing the trustee to use his preferred personal injury attorneys because the trustee is charged with maximizing the estate assets. *See* 11 U.S.C. § 704. Plaintiff Christos Vouzianas only is entitled to the

first $7,500 recovered from the lawsuit, N.Y. Debt. & Cred. L. § 282(3)(iii), and most of the proceeds of the personal injury action theoretically will belong to the estate. Thus, there is some blurring of the lines between Ready's representation of debtor and his representation of the trustee. Nonetheless, we see no clear error in the bankruptcy court's weighing of the facts and her conclusion that Ready's appointment is in the best interest not only of the debtor but also of the estate.

Pryor also argues that the bankruptcy court erred when it compared Ready with the trustee's choice of Marcus & Katz. At the time of its decision, the bankruptcy court had approved Marcus & Katz as special counsel. Throughout the subsequent proceedings, neither Ready nor anyone else ever argued that Marcus & Katz did not meet the requirements of Section 327(a). Rather, the bankruptcy court focused on the lack of evidence that Ready was disqualified and in need of replacement. We acknowledge that the procedural context of the bankruptcy court's decision is unusual because Judge Eisenberg reversed her prior appointment of Marcus & Katz and reinstated Ready. We disagree with Pryor's contention, however, that Bankruptcy Judge Eisenberg never found that Ready was qualified. We are satisfied that the bankruptcy court evaluated the competence of Ready.

Finally, Pryor assigns legal error to the district court's conclusion that Section 327(a) did not apply to the facts of this case. Because we find that Bankruptcy Judge Eisenberg correctly applied Section 327(a) in appointing Ready as special counsel, we need not reach the district court's alternative grounds for affirming the bankruptcy court. We

do note, however, that both courts recognized a valid distinction between a personal injury lawsuit with debtor as plaintiff and other litigation to recover estate assets such as lawsuits alleging fraudulent conveyance, "where any attorney can step in." In both situations, assets of the estate are involved and the trustee is obliged to maximize the return of assets. However, in the situation of a pre-petition personal injury lawsuit, the trustee or the court may determine that the most efficient way to maximize estate assets is to recognize the inherently personal nature of the litigation and the need to keep intact existing legal relationships.

CONCLUSION

For the forgoing reasons, we find no error in the bankruptcy court's appointment of Ready as special counsel, and we affirm the order below. Because the court's order approving Ready was appropriate, the court made no error in denying Pryor's motion to obtain from Ready legal files relating to the state court litigation.

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SACK, Circuit Judge, dissenting:

I have no quarrel with the majority's description of the facts underlying this appeal. To summarize: Christos Vouzianas was seriously injured in an accident. He and his wife Nota retained the law firm of Ready & Pontisakos ("R&P") to prosecute a personal injury action seeking compensation for that injury. Eventually, at least partly as a result of the accident, Mr. and Mrs. Vouzianas filed for relief under Chapter 7 of the Bankruptcy Code. The principal asset of the estate in bankruptcy was the Vouzianas's personal injury action.

The Vouzianas bankruptcy estate's trustee applied to the bankruptcy court for approval to hire a second law firm instead of R&P to represent the estate in the continuing lawsuit. The bankruptcy court approved the application. But later, upon the motion of R&P supported by Mr. Vouzianas, the bankruptcy court reversed itself and entered an order stating that "original counsel [R&P] is retained as special counsel to the Trustee in the Debtors'-Plaintiffs' [the Vouzianas's] personal injury action."

I agree with the majority, the district court and the bankruptcy court that using R&P to continue the lawsuit may well have been a good idea in light of that firm's familiarity with the case, the Vouzianas's confidence in it, and the possibility that the Vouzianas's might themselves personally receive some part of any recovery. But I do not understand, and none of the four other judges to have considered this case have satisfactorily explained, from where flows the authority of the bankruptcy court to appoint an attorney for the trustee against the trustee's will. I therefore respectfully dissent.

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Section 327(a) of the Bankruptcy Code, 11 U.S.C. § 327(a),* permits "the trustee, with the court's approval,"

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* Section 327(a) provides:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accountants, appraisers, auctioneers, or other professional persons, that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title

Section 327(e) provides:

> The trustee, with the court's approval, may employ, for a specified special purpose, other than to represent the trustee in conducting the case, an attorney that has represented the debtor, if in the best interest of the estate, and if such attorney does not represent or hold any interest adverse to the debtor or to the estate with respect to the matter on which such attorney is to be employed.

I think § 327(e) rather than § 327(a) probably governs here. When the bankruptcy judge retained R&P through the order contested on this appeal, it replaced the second firm, which had been retained by the trustee with the approval, however temporary, of the bankruptcy court. R&P was therefore "an attorney" who "ha[d] represented the debtor" that was being retained for "a specified special purpose."

My primary disagreement with the Court, though, is not about the proper section under which R&P should have been appointed to represent the trustee, but whether the bankruptcy court had the power to do so against the will of the trustee under either section.

to appoint its own counsel. And the Bankruptcy Rules provide: "An order approving the employment of attorneys . . . pursuant to § 327 . . . of the Code shall be made *only* on application of the trustee . . . ." Fed. R. Bankr. P. 2014(a) (emphasis supplied). These provisions are not authority for imposing an unwanted attorney on a trustee. To the contrary, they make clear that only the trustee may appoint trustee's counsel and that the court's power is limited to approving or rejecting the trustee's choice.

The majority gives us, and I can find, no cause to doubt that these provisions mean what they say. As a leading bankruptcy-law treatise observes, "[e]ven when the court is justified in declining to approve a proposed employment, the court should not make the selection of an alternate but should allow the trustee to nominate another attorney satisfactory both to the trustee and to the court." 3 *Collier on Bankruptcy* ¶ 327.04[1][a], at 327-26 – 327-27 (Lawrence P. King ed., 15th ed. 2000). The "best interests of the estate" test, which the bankruptcy court employs in reviewing the trustee's choice of counsel, *see In re Arlan's Department Stores, Inc.*, 615 F.2d 925, 931-32 (2d Cir. 1979), "does *not* give the Court license to require the trustee . . . to choose the attorney that the Court believes is 'best' for the case. Rather, the test provides the necessary assurance that the selection will reflect the interests of *all* of the parties in the case." *In re Doors and More, Inc.*, 126 B.R. 43, 45 n.4 (Bankr. E.D. Mich. 1991) (emphasis in original); *see also In re Washington Mfg. Co.*, 101 B.R. 944, 949 (Bankr. M.D. Tenn. 1989) ("[T]his Court . . . [was not] in a position, nor should [it] be, to make such a choice [of local counsel]"); *In re Allard*, 23 B.R. 517, 517, 518 (E.D. Mich. 1982) (reversing

an order of a bankruptcy court directing the trustee to retain counsel selected by the court, and stating that "allowing a bankruptcy judge to appoint counsel for a trustee is contrary to one of the primary goals of the 1978 Bankruptcy Act").

The bankruptcy court did not, so far as I can tell from the record, explain what it thought to be the origin of its power to replace the trustee's choice of counsel with its own. The district court avoided the issue. It held instead that the bankruptcy court did not technically "appoint" the first firm to represent the trustee, but rather permitted the firm to continue to prosecute the debtor's personal injury action. *See In re Christos Vouzianas*, 250 B.R. 478, 481-82 (E.D.N.Y. 2000). The district court also held that § 327(a) "does not apply to the appointment of counsel to a pre-bankruptcy personal injury action." *Id.* at 481. Again, no authority is cited for either proposition.

As noted, the majority of this Court, departing from the district court's analysis, treats § 327(a) as governing the appointment of counsel by the bankruptcy court, *see ante* at [6-7], but offers no rationale for disregarding the language of that provision and the corresponding Bankruptcy Rule indicating that the appointment power belongs exclusively to the trustee. Instead, in concluding that the bankruptcy court had the authority to impose its own choice of counsel on the trustee, the Court cites only *In re Mandell*, 69 F.2d 830 (2d Cir. 1934). *See ante* at [7]. I am confident that *Mandell* does not stand for that proposition under current bankruptcy law.

Under the regime in place at the time *Mandell* was decided, it *was* permissible for a court to supplant the trustee's

choice of counsel. At that time, "[t]he [governing] local rule provide[d], among other things, 'The Court shall not be bound by the wishes of the receiver or trustee as to the attorney, accountant, or investigator to be employed, but where in its judgment it is for the best interest of the estate the Court may deny the request or authorize the employment of some one designated by it.' " *Id.* at 831 (quoting Local Bankruptcy Rules of the Eastern District of New York, Rule 5). The district court in *Mandell* had, against the trustee's wishes, named an attorney to act as trustee's counsel. On appeal, this Court noted that the district court could, under the rules then obtaining, appoint counsel of its choosing in unusual circumstances, but that such circumstances were not present in that case.

> [I]n general we regard it as inimical to good administration to fasten an attorney on the trustee against his will. The relationship between attorney and client is highly confidential, demanding personal faith and confidence in order that they may work together harmoniously.

Id.

The *Mandell* Court, in discussing the then-prevailing rule allowing the court to "select the attorney over the trustee's objection," observed: "Only in the rarest cases should the trustee be deprived of the privilege of selecting his own counsel, and reasons which make it for the best interest of the estate to have the court select the attorney over the trustee's objection should appear in the record." *Id.* The statement, "Only in the rarest cases should the trustee be

deprived of the privilege of selecting his own counsel," remains good law insofar as courts are counseled to use restraint in wielding their power under § 327 to veto a trustee's selection of counsel. But because the local rule permitting the court to select its own candidate has long since been superseded, the Court's holding that a bankruptcy court can appoint trustee's counsel against the will of the trustee is no longer controlling. The current edition of *Collier* reflects the present status of *Mandell*, quoting it only for the proposition upon which there is no disagreement among us:

> "Only in the rarest cases" will the trustee be deprived of the privilege of selecting qualified counsel since "the relationship between attorney and client is highly confidential demanding personal faith and confidence in order that they may work together harmoniously. Thus, *failure to approve the trustee's selection* in the absence of good reason has been called an abuse of discretion."

Collier, ¶ 327.04[1], at 327-26 (emphasis added and footnotes omitted). None of this explains the authority by which the bankruptcy court in the case at bar appointed counsel to represent the trustee against his wishes.

Perhaps, under truly extraordinary circumstances, a bankruptcy court might be called upon to use its broad equitable powers under the Bankruptcy Code, *see* 11 U.S.C. § 105, to force a shotgun wedding between a bankruptcy trustee and lawyers selected by the court to represent the trustee. But neither the bankruptcy court nor my colleagues,

see ante at [2], have demonstrated that the facts of this case are indeed unique or present a situation so extraordinary as to warrant the bankruptcy court's overriding of specific provisions of the Bankruptcy Code and Rules under which a trustee is supposed to go about retaining counsel.

I would therefore vacate the order of the district court and remand the case for further proceedings with respect to the trustee's choice of counsel.

APPENDIX B — MEMORANDUM OF DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED JULY 15, 2000

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 00-147

In Re:

CHRISTOS VOUZIANAS AND NOTA VOUZIANAS,

Debtors.

MEMORANDUM OF DECISION AND ORDER

* * *

SPATT, District Judge.

This is an appeal from an Order dated December 3, 1999 of United States Bankruptcy Judge Dorothy T. Eisenberg, which, at the conclusion of a hearing: (1) reversed a prior order permitting the Trustee to appoint Special Counsel to represent the bankruptcy estate in pursuing the Debtor's pre-bankruptcy personal injury action; (2) ordered the Trustee to retain Ready & Pontisakos, LLP to represent the Trustee as special counsel in the Debtor's pre-bankruptcy personal injury action; (3) denied the cross-motion of the Trustee seeking an order requiring the turnover of all the Debtor's files in the possession and control of Ready & Pontisakos, LLP; and (4) ordered that no compensation or reimbursement

of expenses be made to special counsel without proper application to the Court pursuant to 11 U.S.C. §330.

I. BACKGROUND

Unless otherwise stated, the following facts are not in dispute. In 1994, prior to filing a Chapter 7 petition, Christos Vouzianas (the "debtor") was injured at a work site and retained the law firm of Ready & Pontisakos, LLP ("R&P"), to file a personal injury action on his behalf. Since 1994, R&P represented the Debtor in the personal injury action and had incurred approximately $5,000 in related costs in pursuing this action.

On April 2, 1999, the Debtor filed a bankruptcy petition in the United States Bankruptcy Court, Eastern District, New York, pursuant to Chapter 7 of the United States Bankruptcy Code. On April 6, 1999, Robert L. Pryor, Esq. (the "Trustee"), was appointed interim trustee by the bankruptcy court. On May 17, 1999, Pryor was appointed permanent Trustee of the Debtor's bankruptcy estate.

On June 16, 1999, the Trustee made an application to retain the law firm of Marcus & Katz ("M&K"), as special counsel to the Trustee to pursue the personal injury action of Christos Vouzianas on behalf of the bankruptcy estate. On June 29, 1999 the Bankruptcy Court approved the appointment of M&K as special counsel to the Trustee.

On an unspecified date, Lawrence Katz, Esq., a lawyer with the M&K firm contacted R&P, giving notice that M&K had been retained as attorneys for the Estate. Katz also

requested that all documents in connection with the Debtor's personal injury action be immediately turned over. Despite this request, R&P did not turn over the requested documents and on September 13, 1999 and September 21, 1999 the Trustee, in writing, similarly requested R&P to turnover the contents of the personal injury file. The documents were never turned over.

On September 29, 1999, R&P filed a motion seeking an order reversing the decision of the Trustee and directing that R&P remain as counsel to the Debtor/Plaintiff in the personal injury action. Alternatively, R&P requested a hearing to determine whether the Trustee's decision to replace them was in the best interest of the Creditors and the Debtor. Finally, R&P requested that if the Court replaced them as counsel in the personal injury action, that M&K be ordered to reimburse them for the $5,000 in costs prior to turning over the file.

On October 20, 1999, the Trustee opposed the R&P motion and cross-moved for an order directing R&P to turnover the Debtor's personal injury file pursuant to Section 542(e) of the United States Bankruptcy Code. On November 2, 1999 a hearing was held before Judge Eisenberg on the R&P motion and the Trustee's cross-motion.

On December 3, 1999, Judge Eisenberg reversed her June 9, 1999 order and granted the R&P motion and denied the Trustee's cross-motion. On December 13, 1999 the Trustee filed a Notice of Appeal pursuant to 28 U.S.C. §158(a) and Federal Rule of Bankruptcy Procedure 8001. The Appellant designated the following issues for appeal:

1. Did the Bankruptcy Court err in denying the Trustee his choice of special counsel pursuant to 11 U.S.C. §327(a) by vacating its prior order, dated June 29, 1999, approving the retention of M&K as the Trustee's special counsel?

2. Did the Bankruptcy Court err in appointing R&P as special counsel to represent the Trustee over the Trustee's objection?

3. Did the Bankruptcy Court err in denying the Trustee's cross-motion seeking the turnover of the Debtors' personal injury file maintained by R&P pursuant to 11 U.S.C. §542(e)

II. DISCUSSION

A. *Standard of Review*

A district court hearing an appeal from a Bankruptcy Court reviews the Bankruptcy Court's findings of fact under the "clearly erroneous" standard, *see* Fed. R. Bankr. P. 8013, while its conclusions of law are reviewed under the *de novo* standard. *See In re Arochem Corp.*, 176 F.3d 610, 620 (2d Cir. 1999) (holding that "we review the bankruptcy court decision independently, accepting its factual findings unless clearly erroneous but reviewing its conclusions of law de novo.") (citation omitted); *In re Bennett Funding Group, Inc.*, 146 F.3d 136, 137 (2d Cir. 1998) (same) (citations omitted); *See also In re Porges*, 44 F.3d 159, 162 (2d Cir. 1995) (same) (citations omitted).

It is within this framework that this Court addresses the present bankruptcy appeal.

B. *Judge Eisenberg's 12/3/99 Order Vacating the Retention Order of 6/29/99 Approving M&K as Special Counsel*

1. **The Applicability of 11 U.S.C. §327(a)**

The Appellant contends that Judge Eisenberg erred when she vacated her June 29, 1999 order and reinstated R&P as special counsel to the Debtor's personal injury claim. The Appellant contends that 11 U.S.C. §327(a) mandates a finding that M&K be reappointed as special counsel for the Debtors. Section 327(a) states, in pertinent part:

> Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys . . . that do not hold or represent an interest adverse to the estate, and that are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties under this title.

The Appellant claims that as Trustee, he is authorized to employ counsel of his choice for the benefit of the bankruptcy estate. In the Court's view, while Section 327(a) vests in the Trustee the right to appoint special counsel, the application of Section 327(a) is a limited power and is inappropriate in the present matter.

Section 327(a) states that the Trustee has the right to choose counsel in order "to assist the trustee in carrying out

the trustee's duties under this title." The Bankruptcy Code further states that the purpose of Section 327(a), "is to protect the bankruptcy estate and its creditors from unwarranted and gratuitous claims." 11 U.S.C. §327 note (1990) (Purpose of Rules Relating to Retention of Professionals). In addition, the duty of a trustee is articulated as "expeditiously liquida[ting the] estate and avoid[ing] all unreasonable expenses either in preservation or distribution." 11 U.S.C. §327 note (1990) (Duty and Function of Trustee).

Section 327(a) does not authorize the Trustee to appoint counsel of his choice with regard to a Debtor's pre-bankruptcy personal injury cause of action. The Court agrees with Judge Eisenberg's conclusion that it is in the best interest of the Estate to allow the Debtor to have his choice of counsel. In addition, the Court notes that interfering with a five year apparently amicable attorney-client relationship, could be detrimental to successfully culminating the personal injury action.

The Trustee also claims that Judge Eisenberg erred when she failed to apply the two-prong test set forth in Section 327(a). The Court disagrees. As stated above, Section 327 does not apply to the appointment of counsel to a pre-bankruptcy personal injury action, and therefore, the two-prong test is also inapplicable.

2. Deprivation of the Trustee's Right To Choice of Counsel

The Trustee also claims that the Bankruptcy Court's decision to decline to permit him to appoint M&K as special

counsel, would inhibit his ability to properly oversee the personal injury claim. This Court will not interfere with a decision made by Judge Eisenberg, in the exercise of her discretion, that it is in the best interests of the Estate for the Debtor to maintain his current relationship with R&P as counsel in the pre-bankruptcy personal injury action. This is especially so, in view of the fact that Judge Eisenberg held a hearing in which she found insufficient evidence warranting the appointment of new counsel to prosecute the Debtor's personal injury action.

In addition, the Court notes that the interests of the Estate are further safeguarded given the power of the trustee and the Bankruptcy Court with regard to approving any settlement with regard to the Debtor's personal injury action. Pursuant to Bankruptcy Rule 9019(a), "[o]n motion by the trustee and after a hearing . . . the court may approve a compromise or settlement." Ultimately, the Bankruptcy Court has an obligation to determine whether a settlement is in the best interest of an estate. *See In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2d Cir. 1992). This function of the Bankruptcy Court provides a safeguard that will further ensure that the Debtor's choice of counsel will be in the best interests of the estate.

C. *The Appointment of R&P as Special Counsel*

The Trustee also contends that Judge Eisenberg erred when she "appointed" R&P to prosecute the Debtor's pre-petition personal injury claim. Again, the Court disagrees. While the Bankruptcy Court did reinstate R&P as special counsel, this firm was not "appointed" as new counsel

pursuant to Section 327. Stated Simply, Judge Eisenberg did not appoint R&P as counsel. Judge Eisenberg permitted counsel of the Debtor's choice, who had been previously handling this case, to continue to prosecute the Debtor's pre-petition personal injury claim.

D. *The Trustee's Cross-Motion*

In light of this decision finding that R&P should remain as counsel to the Debtor, the Trustee's contention that the Bankruptcy Court erred in denying his cross-motion seeking the turnover of the Debtor's personal injury file, is denied as moot.

III. CONCLUSION

Having reviewed the parties' submissions it is hereby

ORDERED, that the December 3, 1999 Order of United States Bankruptcy Judge Dorothy T. Eisenberg is **AFFIRMED** in its entirety and the appeal is hereby **DISMISSED;** and it is further

ORDERED, that the Clerk of the Court is directed to close this case.

SO ORDERED.

Dated: Uniondale, New York
July 15, 2000

s/ Arthur D. Spatt
ARTHUR D. SPATT
U.S. DISTRICT JUDGE

APPENDIX C — TRANSCRIPT OF HEARING OF MOTION OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED NOVEMBER 2, 1999

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

Chapter 7

Case No. 899-82572

In the Matter of:

CHRISTOS AND NOTO VOUZIANAS

Debtor

MOTION BY DEBTOR for an Order to (1) Reverse the Decision of Trustee Order dated 6/29/99; (2) Direct that the original Counsel remain as Special Counsel to Trustee; and (3) Direct that Counsel be required to reimburse litigation cost in advance and turn over files – mtn filed 9/30/99

Westbury, New York
November 2, 1999
10:00 a.m.

BEFORE: HONORABLE DOROTHY EISENBERG,
United States Bankruptcy Judge

* * *

Appendix C

[2] PROCEEDINGS

THE COURT: Christos and Noto Vouzianas.

MR. READY: Good morning, Judge. My name is Ken Ready. I'm the attorney for the debtors, the movant in this case.

THE COURT: Yes, sir, I've read your papers.

Who is here representing the trustee?

MR. GIULIANO: Good morning, your Honor, Anthony Giuliano of Pryor & Mandelup for the trustee.

THE COURT: Can you tell me what the trustee did to determine why it should change the law firm that was handling the personal injury action?

MR. GIULIANO: Yes, your Honor, I can tell you exactly what we did.

The trustee had ascertained that it would be in the best interests of the estate to utilize a firm with which the trustee is familiar, although the trustee —

THE COURT: Well, how did he come to that conclusion without making an inquiry to see whether it was in the right hands, based on the debtor's request and retention?

MR. GIULIANO: Judge, if I may back up for a minute.

THE COURT: Yes.

MR. GIULIANO: If I understand correctly, the [3] position of the trustee is that it is the representation of the trustee that takes over upon the filing of the bankruptcy.

THE COURT: That's correct, and I am trying to determine how he arrived at a conclusion.

We are dealing with a personal injury lawsuit which is personal to the debtor. That doesn't mean that the creditors don't have an interest, but it seems to me it's slightly different than a lawsuit for damages or for monies due and owing, and that some consideration should be given to the choice of the debtor, because it's his personal injury action and he is seeking the best recovery he can get, because regardless of what goes to the creditors, he has an interest in it.

MR. GIULIANO: That's correct. Judge. He has an interest in it to the extent, obviously, of his exemption and any surplus above that exemption.

THE COURT: That's correct.

MR. GIULIANO: The trustee also has an interest, and that is to maximize his return to the estate.

THE COURT: And I want to know on what basis he made that determination, that the counsel that is handling it for five years was to be replaced?

MR. GIULIANO: Judge, if I may, I do not believe that the inquiry or the focus of this motion — although I [4] will

address the Court's concern — is whether or not counsel, this counsel or counsel for the trustee, in an analysis of who may be the better personal injury attorney with respect to an objective standard. I believe that, first off, it is who is the trustee more comfortable in having represent the estate in a matter that involves both the personal injury action and bankruptcy matters.

THE COURT: Excuse me, excuse me.

MR. GIULIANO: Yes?

THE COURT: What do you mean "more comfortable"? There has to be a basis for this.

MR. GIULIANO: Judge, I believe that in our original application to approve Marcus & Katz as attorney for the trustee, we set forth amply the criteria which we believe that they were capable and able to handle this personal injury action. Now that was done in July, Judge, and that order was approved by the Court, approving Marcus & Katz as attorneys.

THE COURT: Sir, it is not uncommon, and we normally approve applications by a trustee, but we expect the trustee to do something before he makes that application, and that is to make an inquiry to determine why he thinks that a change is appropriate. I didn't question it when the application came through, because I believed he had done it, but now I am seeking that he hadn't done it.

[5] MR. GIULIANO: Well. Judge, I don't know if you're seeing that he has or has not done it. I don't believe that's

addressed in any of the papers, because I don't really believe that that level of inquiry is appropriate at this time.

First of all, Judge, if I may. I don't even believe that Mr. Ready has standing to be here today, to stand in front of this Court and engage the trustee in this kind of activity; that's number one.

THE COURT: He certainly does. He certainly does. He has standing, he has an interest in this particular matter. He's a party in interest. In fact, he has a lien on the claim.

MR. GIULIANO: And to that extent he is protected, Judge.

THE COURT: Well, I don't see how he is being protected when you look at the out-of-pocket expenses that he has laid out in a case which is a contingency case, and where State law provides that he is to be reimbursed if it is to be taken over by someone else.

MR. GIULIANO: Judge, it is not my understanding that State law requires incoming counsel to reimburse the outgoing counsel, based upon an obligation of the incoming counsel. The State law —

THE COURT: We're talking merely about [6] reimbursement for out-of-pocket expense.

MR. GIULIANO: That's correct, Judge.

THE COURT: Who is supposed to pick that up?

MR. GIULIANO: It is picked up by incoming counsel, based upon the obligation of the client. It's not incoming counsel's obligation, it's the client's obligation, and that's a very important distinction, because none of the cases that I cite, and none of the cases cited by Mr. Ready have anything to do with the imposition of the bankruptcy. What happens, typically in State Court, incoming counsel says, "I will take the responsibility of paying the out-of-pocket expenses of outgoing counsel to outgoing counsel, based upon my taking over the client's obligation to reimburse." It's the client's obligation.

That, to me — now, Judge, normally I would have said to Mr. Ready, "That's fine. To you, you will have a lien in the proceeds for all of your expenses, the out-of-pocket expenses, whatever statutory retaining lien, whatever liens you have on it, you will have a lien on the proceeds, absolutely." But now he's pointed out to me that, you know, case law is pretty clear, and out-of-pocket expenses are not covered by the lien; they're not covered by the charging lien; they're not covered by the retaining lien, and they're an obligation of the client, not the attorney. So what he's telling me is, Judge, and this is exactly what 542(e) is all [7] about, he's saying, "I won't give you your files; you, the bankruptcy trustee, I will not turn over the files until you pay me." And what does he want to be paid for? An unsecured, non-priority claim of the client. That's what it is, Judge, because it's not covered by his liens. He's not even secured to that amount.

He can file a proof of claim and now he's protected. He has no pecuniary interest in that whatsoever. Under normal circumstances, Judge, I wouldn't have even questioned when

he said to me, "My lien encompasses all of the money that I am owed, including my out-of-pocket expenses."

"Well, then, certainly you will get them."

But then when he says to me, "You know, they're not covered by a lien, therefore, they're not secured. And, furthermore, they're responsibility of" — these are the cases that he cites, Judge, that I just agree with — "Furthermore, it is the client's obligation that incoming counsel is taking over," the client.

THE COURT: But the client isn't selecting the new counsel, the client, being the debtor.

MR. GIULIANO: Right, and the debtor's prepetition obligations that are not secured are unsecured obligations, which if he believes he is owed, he can file a proof of claim for it.

[8] See, under normal circumstances, Judge, I would say that the charging lien or the retaining lien encompassed out-of-pocket expenses, and then we would say to Mr. Ready, "Okay, to that extent, you will have a substitute lien of equal value in the recovery." Now, none of that means — and the cases are very clear. 542(e), Judge, you are not supposed to coerce the trustee into paying something out of order, to pay somebody who is not supposed to be paid ahead of time. When an attorney says —

THE COURT: Well, where is the law and the specifics that you are talking about? The only case you cite is an Illinois

case, whereas I don't have — you haven't cited any cases that refer to this specifically. It is clear, a charging lien for fees is not prohibitive of a turnover. What's being raised today is something different; it is the reimbursement for actual out-of-pocket expenses, not just for the client, that's the client's representation, but it goes with the case. It's an investment that has already been made on behalf of the debtor.

MR. GIULIANO: What it is, Judge, is an obligation of the debtors that arose prepetition. That's what the — and if I may quote from cases cited on page 11 of my opposition, which is also cited by Mr. Ready. The case is *Silverstein v. National Auto Renting Corp*. And it's in that case which I quote is there the Appellate Division, [9] First Department, states: "The disbursement of the substituted attorney at best can only be an advance on behalf of the client. When the relationship of the attorney and client was terminated, the substituted attorney was entitled to be reimbursed for the disbursements properly chargeable against the client."

So what happens in this case is, we — and then further, if I may continue, the case of *Melendez vs. Union Hospital of the Bronx*. They speak about — and interestingly enough, if I may backtrack a little, they say, "By failing to turn over the requested documents, the only party to be prejudiced would be the plaintiff." But in any event, they say with respect to the obligations, "reimbursement should be separate and distinct from any charging lien that the outgoing firm may possess.

So we have two separate entities here: We have the charging lien, which survives into the bankruptcy, which a

substitute lien of equal value is given to outgoing counsel. Then we have something else, and that something else is the disbursements, which are not covered by the charging lien, which, under New York State law, are an obligation of the client. So it's a prepetition obligation of the client's.

THE COURT: Fine. We now have the trustee standing in the shoes of the client. He's making the choice [10] to change the attorney.

MR. GIULIANO: Judge, there are a lot of prepetition obligations that the debtor walks into and files bankruptcy on behalf of. This is just another prepetition, unsecured obligation, and to have the trustee coerced, particularly with the 542(e) requiring the turnover of these documents, it's ludicrous.

THE COURT: I think we wouldn't have arrived at this if I had been given, or we had now, good reason for the change, or this wouldn't arise in the first place. And I've read the papers and I've thought about it. Now what you're saying is, yes, you have a charging lien, but we're now going to select attorneys who may or may not be better than what we had before, and they may lose the case. Then what protection does Mr. Ready's firm have that he's even going to be reimbursed for the out-of-pocket, forgetting what benefit he may receive for the five years of legal services.

MR. READY: Judge, may I respond to that?

THE COURT: Yes, I think you will. I'd like to hear the response, first, from counsel.

MR. GIULIANO: I would love to respond.

First of all, Judge, *In re Magna Products*, and this is going back to 1957, the latitude a trustee is to be given to select his own counsel is enormous.

THE COURT: I agree, it's enormous, but I want [11] to know the basis upon it. If I had any basis whatsoever I could understand it, but I don't see any basis except selecting somebody else because he knows someone else can do the job.

MR. GIULIANO: Judge, I think that — Judge, if it requires an additional affidavit by the trustee as to what his motivations were in selecting separate counsel, which I don't think is even appropriate in these circumstances —

THE COURT: But I do.

MR. GIULIANO: — and understandably —

THE COURT: In a personal injury case, I do, and I would make such finding.

MR. GIULIANO: So then based upon your request, I can provide you with an additional affidavit as to what qualifications Marcus & Katz may have, what rationale the trustee may have for selecting attorneys that they work with or that they have worked with on other cases and have had positive results. I mean, I don't know, in choosing an attorney, I don't know what better you could have than that, that in other cases there have been successful results, in other

personal injury actions, for a highly qualified firm. That's what —

THE COURT: And discounting five years of work to the point of — bringing it to the point of trial where [12] the injured party believes they would do the best for that person, that doesn't count? I don't even see, if the allegations are correct, any inquiry made by the trustee to see what this counsel did or didn't do before making a selection of someone he thought would be very competent, which is not the same thing.

MR. GIULIANO: Judge, even supposing for a moment the trustee — and I can't speak to the trustee's motivation for making this determination, but supposing for a moment that the trustee analyzes whatever enormous factors there are in the personal choice of choosing counsel to represent him and the estate, what articulations would the Court require, aside from some sort of objective layout of capabilities of the attorneys that would make that decision more rational?

THE COURT: I think that there's a difference. If you're first starting a case and you have capable — three capable attorneys, the trustee is entitled to make a selection. But we have a history here: One, that the debtor retained capable counsel; number two, that capable counsel has been actively involved for four or five years and has done a reasonable job. Now it seems to me that there is another area that has to be considered here, whether to undertake dismissing proper counsel and putting in new counsel that has to first revisit everything that has [13] taken place, has to gain the

confidence of his one witness, which is the injured party, and why that should be superior, I'd have to have some reason.

Now, there have been cases where prior counsel has been inadequate or has not performed appropriately. But where that isn't the case, I think it may be a mistake to replace that counsel, personal injury counsel.

Would you like to respond, sir, I'd like to hear you.

MR. READY: Your Honor, Kenneth Ready for the debtor movant.

I agree with the sentiments that the Court has been expressing today from the bench. I've been doing this for 15 years, and you come away with the sense that these personal injury cases do not have an intrinsic value; that the value that these cases have have something to do with the skill of the attorney who handles it, the experience, and the time and money you're willing to invest in the case.

Now I don't say anything bad about the attorney that the trustee would put in. I don't know them and I'm not in a position to do that, but I would not have invested five years and I would not have invested $5,000 if I didn't think that I could do justice by my client in the case. I am also greatly concerned with the fact that I recognize that in order to bring this case to fruition and full value, [14] it's going to take a trial and a considerable investment. We'll need several doctors, as I have pointed out; we'll need a construction site engineer; and an economist. That will exceed the sum of $20,000, maybe even $30,000.

Appendix C

The attorneys who defend these kinds of cases recognizes, number one, the inertia that's created when there's a last-minute change of counsel; and they also are perceptive to whether or not the new attorney is going to make the investment, not only in time but also in dollars, in disbursements, to bring the case to fruition.

There was not a single inquiry made of me, your Honor. I've been doing this for 15 years. This is not the first plaintiff I've represented who has gone into bankruptcy, and in 100 percent of every other case I've handled, where this matter has arisen, the trustee has spoken to me and I've always retained the file. The only direct inquiry that I had from the trustee was when he wrote me a letter asking for some cursory information about the file, which I responded to within two or three business days. He had my response immediately. There was no information that he was thinking about changing attorneys.

When this first came to mind, I called the trustee and I called the trustee personally on three occasions, and on not one occasion did he either take my call personally or return my call.

[15] I think the Court is quite correct when you point out that there needs to be a certain relationship that is developed between the attorney and the client in an injury matter, that enables the case to go forward and bring back a productive result.

You know, it just comes down to fairness. I think that's what this is all about. We're looking for nothing more than

fairness. I wasn't even given a chance to tell the trustee the work I've done. And, Judge, I've been to the Appellate Division on this case affirmatively, in an attempt to push the barriers with respect to the New York Labor Law. So, your Honor, I think that if you're looking for nothing more than fairness, I think fairness dictates that the file stays where it is.

Just briefly, to respond to the issue of disbursements and return of disbursements: That Section 542, and I don't pretend to be an expert in bankruptcy law, I'm not. What that says essentially is that, as I understand it, that the attorney cannot coerce the debtor by not giving his file unless the debtor pays the bill. Well, that's been the law of New York for a long time, and I have no right to retain the file if the party, the plaintiff himself, pays my disbursements. I've got to give it up. I can't insist on my lien until the conclusion of the case. So there's nothing new in that, in the context of personal [16] injury matters, but to invest $5,000 and now to take my investment in this matter and to put it in the hands of somebody else whose skill I don't know, whose vigor I don't know, who will have a relationship with the plaintiff that I'm not sure will come to fruition, I don't know what his ability is with the doctors, et cetera, forces me to make a blind investment.

I'm going to go back to what I said initially, and I think that fairness says that the file should stay here, the trustee having made no inquiry as to the work that was done on this case by my firm.

MR. GIULIANO: Judge, if I may point something out in what Mr. Ready has just said; you notice some of his

concerns, "I don't know the attorney taking over the case, I'm not familiar with him, I'm not familiar with his work, so I'm concerned about my charging lien." Judge, I don't understand how —

THE COURT: He's not concerned as much for his charging lien as he is with reimbursement. That's the only thing he's seeking. He's not seeking to be paid his charging lien.

MR. GIULIANO: Well, he was speaking specifically as to the long-term outcome of the case.

THE COURT: Yes, if he's not paid, reimbursed for the expense, he doesn't know whether he'll ever see it, [17] and he made an investment in this case, just as new counsel would have to make an investment if he seeks to continue.

I'm looking at the application, it just says, "I choose to retain Marcus & Katz as special counsel on a contingency basis." It's also on a contingency basis. He also has to lay out money, and I think part of it is — I don't have, this is not your typical case for damages, for fraudulent conveyance, where any attorney can step in. This is a personal injury case where the person injured has the most to gain or lose, and that the estate is really secondary. The estate benefits when the debtor who has been injured has good counsel, and I think this is a unique situation, and you don't just throw out four or five years of competent counsel and then retain new counsel, and I am granting your motion.

I am vacating my prior order of intention. Unfortunately, there wasn't enough information in that just to say, "I choose

to select someone else," and I haven't heard anything to make me feel that there was an investigation or an inquiry upon which a trustee could make a determination.

Yes, sir?

MR. GIULIANO: Your Honor, if I may?

THE COURT: Yes, sir.

MR. GIULIANO: As I indicated earlier, I did [18] not believe, although your Honor feels differently, that the motivation of the trustee was at issue here.

THE COURT: It isn't a matter of motivation, it is a matter of substantiation for a determination to throw out counsel and get other counsel.

MR. GIULIANO: Then, your Honor, all I ask the Court is that the trustee, if the affidavit with the original retention order was insufficient, that he be able to provide a substitute or additional supplemental affidavit as to the reasons for his choice, why he chose Marcus & Katz, why he didn't choose —

THE COURT: Not why he chose the other, but why he did not seek to continue the attorneys that the debtor had selected, that the injured party had selected and who felt that he could work with him.

MR. READY: Judge, may I add that the first element of relief that I sought in my motion was directed at the trustee,

that the order be reversed. He had an opportunity to be heard and he put in nothing of a personal nature.

THE COURT: I agree. Your motion is granted. Settle an order.

MR. READY: Thank you, your Honor.

THE COURT: There's no sanctions, either way.

MR. READY: Thank you.

[19] THE COURT: You might even follow up, counselor, 361, which deals with adequate protection for a party who has an interest in a case, and at this point they've made an investment, they have an interest, it says that the Court has to determine whether — what the adequate protection is, and based on that alone, including the right — I would probably direct that 361(1) apply, requiring the trustee to make a cash payment, to the extent that he seeks to use this property, which is this lawsuit.

MR. GIULIANO: To cover disbursements, your Honor?

THE COURT: Yes. Out-of-pocket disbursements.

MR. GIULIANO: But, if I understand, your Honor is granting his motion that he retain the lien above — and you're vacating your previous order so that he is continued as attorney for the estate.

THE COURT: That's correct. That's right. So I'm not dealing with the second part of the motion, but I don't see any reason why this attorney should not complete the job.

I understand in your supplement, sir, you said that the appeal that you took was granted?

MR. READY: The appeal that we took was denied, your Honor. We made a motion under the labor law for summary judgment and liability. It was denied. We moved to [20] reargue.

THE COURT: Right.

MR. READY: The initial decision was adhered to and we went to the Appellate Division. It involves an area of law that happens to be in transition in the Second Department and not the First and Fourth Department.

THE COURT: This is the issue of summary judgment for liability?

MR. READY: It's an issue of whether or not absolute liability applies when a man falls from a height, such as working on a ladder as the plaintiff is doing in this case. We believe that the Second Department was wrong and we will look for certiorari to the Court of Appeals at the conclusion of the trial.

THE COURT: You can have the trial and still appeal?

MR. READY: Unless the trial Judge doesn't send the matter to the jury and says as a matter of law that the plaintiff

is entitled to a judgment for liability, and then we'll go into damages.

THE COURT: So if the Judge doesn't say that, then you're going to appeal before or after a jury trial?

MR. READY: If we win, it's an appeal we're not going to take, Judge. If we lose, then we'll take that appeal. But we're being optimistic.

[21] THE COURT: In other words, it's an interim decision; is that it?

MR. READY: Yes, interlocutory appeal.

THE COURT: Interlocutory; all right.

MR. READY: Judge, I appreciate the work that you did on the case. I could see that you read the papers, and —

THE COURT: I read papers.

MR. READY: And the plaintiff is appreciative of that. We don't always get that, not in this court but in other courts.

THE COURT: I read the papers. It's an unusual case. I usually don't like to supplant — for good cause I would do it, you would be out of here in five minutes.

MR. READY: And rightly so, Judge.

THE COURT: But I think that certainly some discretion in a personal injury case has to be given to the debtor's choice

and to the work and services that have been performed. There should be at least an inquiry and some kind of an analysis so that the trustee can say to me, "Well, we don't think he was adequate or appropriate" or whatever, for certain reasons. But not just saying, "Well, I think I have other good counsel." Well, that's fine, and I'm sure they're good counsel, but under these circumstances, I would not have signed the order if I had [22] known these factors, and, therefore, I can always revise my own order and I am doing that.

Settle an order.

MR. READY: Thank you very much, Judge. Thank you.

(Whereupon, the proceeding was adjourned.)

* * * *

APPENDIX D — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 3, 1999

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

Chapter 7

Case No.: 899-82572-478

In re:

CHRISTOS VOUZIANAS AND NOTA VOUZIANAS,

Debtors.

ORDER

Our motion having been made on October 1, 1999 by Ready & Pontisakos, L.L.P. for an order: (a) reversing the decision of Trustee to appoint Marcus Katz as Special Counsel to the Trustee to pursue the personal injury action of Debtors, CHRISTOS VOUZIANAS and NOTO VOUZIANAS, on behalf of the Bankruptcy estate, thus directing that original counsel, Ready & Pontisakos, L.L.P., to remain as counsel to Debtors-Plaintiffs in the personal injury action; or alternatively, (b) setting the matter down to determine whether the Trustee's decision to replace original counsel is in the best interest of the creditors and debtors and alternatively, (c) directing that incoming counsel be required to reimburse litigation costs in advance of outgoing counsel's responsibilities to turnover the file; and the Trustee having opposed the motion in its entirety and having made a

cross-motion on October 26, 1999 pursuant to Section 542(e) of the Bankruptcy Code seeking the turnover of documents from Ready & Pontisakos, L.L.P. pursuant to Section 542(e) of the Bankruptcy Code and for costs, including attorneys fees incurred in connection with the turnover of documents; and a hearing having been held on the motion and cross-motion on November 2, 1999; and the Firm of Ready & Pontisakos, L.L.P. having appeared by Kenneth J. Ready, Esq., in support of the motion and the Trustee having appeared by his attorneys, Pryor & Mandelup, L.L.P. in opposition to the motion; and all parties having been heard, it is hereby

ORDERED, that the decision of the Court permitting the Trustee to discharge Ready & Pontisakos, L.L.P., debtors' original personal injury attorneys, and to appoint Marcus & Katz as Special Counsel to the Trustee to pursue the personal injury action of Debtors, CHRISTOS VOUZIANAS and NOTO VOUZIANAS, on behalf of the Bankruptcy estate is reversed; and it is further

ORDERED, that original counsel, Ready & Pontisakos, L.L.P., is retained as special counsel to the Trustee in the Debtors'-Plaintiffs' personal injury action; and it is further

ORDERED, that no compensation or reimbursement of expenses shall be made to special counsel without proper application to the Court pursuant to 11 U.S.C. §330 and further Order of the Court; and it is further

ORDERED, that the cross-motion of the Trustee seeking turnover of all the Debtors' files in the possession and control

of Ready & Pontisakos, L.L.P. pursuant to §542(e) of the Bankruptcy Code is denied.

Dated: Westbury, New York
Dec. 3, 1999

s/ [stamp] DOROTHY EISENBERG
THE HONORABLE DOROTHY T. EISENBERG
UNITED STATES BANKRUPTCY JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 5, 2001

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 5 day of October two thousand one.

Dkt No: 00-5055

In Re: Vouzianas

A petition for rehearing and a petition for rehearing en banc having been filed herein by the appellant Robert L Pryor, Esq as Chapter 7 Trustee of the bankruptcy estate of Christos Vouziana and Nota Vouziana.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active

service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE,
Clerk

By: s/ Art Heller
Art Heller,
Administrative Attorney